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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 486

RUBEIN V. JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

ON APPLICATION FOR PETITION ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF

Preliminary Comments

In considering some of the contentions made by the Government, it becomes necessary to comment on its method of erroneous statements of fact which tend to create suspicion of wrongdoing where none actually does exist, and further, to pass lightly upon important issues as if they did not exist.

For instance, on page 16 of the Government's brief, it is stated that Petitioner sold some land in Texas to Miss Lorena Duling, prior to 1941. The record shows under

direct examination and also under cross-examination, that this is not true as she was sold a partnership interest directly into an oil well that petitioner was drilling (R. 892, 945).

It is important that this fact be established in its true light as the petitioner will establish from the record that his acts in this matter—and other matters of selling or attempting the sale of oil-royalties to a number of the investor-witnesses could not come within the breadth and scope of the general Pattern Of the alleged scheme as charged by the Government but on the other hand that the transactions were in themselves evidence of a separate scheme to consummate acts not within the scope of the one general conspiracy charged by the indictment.

It is also noteworthy to take cognizance of the fact that the government states in it's brief on page 44 that this petitioner's arraignment was delayed until May 26, 1943, due to his efforts to negotiate favorable sentence in the event he would plead guilty (R. 190-192, 201-202). The Government certainly cannot rely upon their contention in this respect by their claim that Mr. Edward R. Schowalter, Attorney at Law, represented this petitioner in an attempt to enter a plea of guilty as stated by the United States Attorney (R. 190-192) for the true facts in relation to this matter was set forth and corrected in open court by this petitioner (R. 204, 205), where there was conclusively shown to the trial court that Mr. Schowalter did not legally represent this petitioner, and further that this petitioner never did engage this attorney to so represent him. The Courts have consistently held that one is entitled to representation of counsel of his own choice and in this instance this attorney had been engaged to represent him by a third party without the petitioner's knowledge and consent. Further, the Government cannot rely upon the statement that delay in the trial of the case was invited by the letter set forth

in the record (R. 201-202), inasmuch as such letter there states in its full context that it was the desire of this petitioner to go to trial at an early date in any event to relieve him of mental strain and anxiety.

In this reply brief this petitioner will deal only with the following two matters because of the foregoing misstatements of fact by the Government in their brief and prefers to leave all other matters and questions raised by the original brief in status quo for the interpretation of this Honorable Court in the light presented.

1

The Evidence Does Not Show or Establish a General Conspiracy and Scheme, But, on the Contrary is Conclusive of Separate and Distinct Schemes.

As an illustration of this petitioner's alleged participation in the so-called general conspiracy, the Government has seen fit to describe such alleged participation on Page 16 of their brief stating: "Prior to 1941, Rubein Johnson had sold some land in Texas to Miss Lorena Duling. . . ." As previously pointed out such was not an interest in land but was a partnership interest vested directly in an oil well in Texas (R. 892, 945, 952).

It is conclusively established from the record through this witness that under the circumstances of fact there related that there was not a one general scheme; for this petitioner with one Overgaard (named in the indictment as a confederate but not indicted because of death) advised the witness that her deeds should be examined and further that such were not correct (R. 946, 947). Such action here on the part of this petitioner (with Overgaard) could not be construed as a furtherance of the alleged scheme but on the other hand would have the force and effect of arousing suspicion in relation to her transactions, and further could

not come within the sphere and scope of lulling, loading and reloading as the Government contends. Further, the record established that Safir (co-defendant) advised the witness-investor that he had seen Diaz and Silverman talking together in the Heidelburg Hotel, Jackson, Mississippi (R. 925-26-36). Does this look like a One General Conspiracy in the true light of the fact that Diaz had stated to the witness-investor that he did not know Silverman (R. 926)? If there had been Agreement—Knowledge—Concert of Action as between the defendants or confederates, Overgaard, Johnson, Diaz, Silverman and Safir—Would These Things Have Happened in the True Light of Common Sense and the Elements of Conspiracy? No. Had such been true that a conspiracy existed between these defendants in one common enterprise, this petitioner with Overgaard would not have stirred up discontent by the request that her deeds be examined and that they were not correct nor would Safir have aroused her suspicions (R. 925-926) in light of the fact that Diaz had emphatically stated to her that he did not know Silverman (R. 926). No—If There Had Been One Common Enterprise—Those Things Would Not Have Happened. Here the Bald Facts Refutes the Contention of the Government in Its Allegation of a One General Scheme and Conspiracy and Further Destroys the Appellation Placed Thereon by the Circuit Court of Appeals in Their Statement of a "Wolf Gang Pack That Moved in for the Kill." Further, there are other acts of this petitioner which are not within the scope of the pattern and design of the alleged scheme such as the investor-witness, Miss Marguerite Monjure (Mrs. Matthews) where from her own admission this petitioner offered her oil-royalties for sale, on his every contact with her (R. 987). She further admitted she would not pay any attention to petitioner's offer on oil-royalties because she was so sold on Plaquemine Parish Land (R. 987), and further stated that

because some one wanted to buy her land that she had to have five acres more (R. 987) and further that she requested such land from the petitioner (R. 987). In this instance it was strictly giving the investor what she wanted when she would not buy what the petitioner offered for sale—namely, oil-royalties. To hold that such acts of this petitioner here were anything but acting in his own individual capacity would invite stretching the imagination. This same fact was further brought to light in the evidence presented by Dr. Prentiss Smith (R. 525, 526, 527, 528, 529), where oil-royalties were offered to the investor-witness—where no mention or association was had with a land deal—after this investor-witness had been sold such land. Had There Been a Common Enterprise and a Single Conspiracy as the Government Charges and Contends, Certainly the Petitioner Here Would Not Have Lost an Opportunity to Further That Scheme by Boosting This Land in Such Way as to Invite or Anticipate Further Sales in Which He Would Participate in That Common Enterprise. The Thread of Mutual Assistance in the Elements of Agreement, Knowledge, Concert of Action, Here on a Common Enterprise Are Certainly Lacking in Proof by the Facts of Evidence to Prove a One General Scheme. However, From the Foregoing Instances Are Shown Separate Acts, Not in Unison and Accord With the Alleged Pattern of Loading, Reloading, Lulling to Conform to a General Common Enterprise But in Actuality Those Facts Establish Acts That Are Contrary to Such Where One Alleged Co-conspirator Acts to Thwart the Efforts of the Other Alleged Co-conspirator. If such can in effect be conspiracy, then, this petitioner contends that such can only be done as the result of vivid imagination—and not from the legal substance and elements that go to constitute conspiracy.

2

That the Trial Court Should Have Granted This Defendant's Motion for Directed Verdict Which Motion Was Made at the Opening of the Trial for the Reason that the Defendant Had Been Denied a Speedy Trial Granted by the Sixth Amendment to the Constitution of the United States.

The Government contends that delay in the trial of this case was done in an effort to allow negotiations for a plea of guilty to be entered by Petitioner. Such has been disproved by previous reference to the record in this reply brief on Page 2. The Government further contends on Page 44 of their brief that this Petitioner's defense was not in any way impeded by delay in trial in that witnesses, if any, were no longer available. What the Government evades though is the fact that in the invasion and abridgment of this constitutional right that other constitutional rights are automatically invaded, and further that such invasion implies prejudice. Here, the delay in trial caused Mental Strain and Anxiety—as set out in the text and context of his letter (R. 201-202). There the letter requesting an early trial calls attention to this mental strain and anxiety directly to the Government—it makes them aware of the existence of such in the event of unwarranted delay. Extending as it did over a period of time—such did in effect constitute "cruel and unusual punishment" contrary to the 8th Amendment to the Constitution. Such was caused and done through the invasion of that right of the Sixth Amendment to a speedy trial in the first place. Further, the Government knew this Petitioner was serving a sentence in the United States Penitentiary, Atlanta, Georgia, and that he could be prevented from making application for parole with a pending indictment against him as the Govern-

ment well knows that it is not the policy of the United States Board of Parole to consider applications for parole with pending indictments upon which there has been no bond made. Petitioner does not claim that parole is a vested right as it is only a privilege extended by the Government and by the Congress but he does claim that any infringement of his right to make application for parole is the invasion of a vested right. He is extended the right to make application through the parole laws, rules and regulation, etc., which have the force and effect of law and become in effect part of his sentence as entered, and such right of application for parole is a vested right that was here infringed upon by this unwarranted delay in trial on this case to deny him "due process of law" as consistent with that right of the 5th Amendment to the Constitution. Thus, it is contended that the Government cannot rely only upon their contention that delay did not impede his defense by the lack of defendant's claim of the availability of witnesses. That question here does not stand alone—but as previously pointed out there are other questions at issue and consideration of those questions must be taken in the light of the overall picture that is here presented where undeniable damage has been done to the just and true cause of this petitioner. With this letter (R. 201, 202), and his Motion for Speedy Trial (being the so-called writ of mandamus elaborated on in the original brief), such, did constitute two attempts in good faith on the part of this petitioner to have this case come to trial. He did all in his power to get that done to the best of his knowledge and effort but it availed him nothing for the Government continued to ignore his vested constitutional right in this matter for a speedy trial, to his damage and detriment. The defendant performed every legal requisite to come within the scope of this valuable guarantee of the Sixth Amendment. The time element here in the delay of trial was unwaranted—and further,

was too long to be within the text and context of that term of a speedy trial guaranteed by the Sixth Amendment.

The Question as Here Presented—under These Identical Circumstances Has Never Been Ruled on by This Honorable Court. The Only Authority Available Is the Citation of Principles of Law as Laid Down by the Several Courts in Respect to This Matter. Those Principles of Law Have Been Cited by This Petitioner in His Original Brief and This Case Is Within Those Principles of Law Cited Where the Defendant Here Asked for and Demanded a Speedy Trial—once by letter, secondly by motion, and did not get it, then came before the Court asking by written motion that a directed verdict be granted in this matter which was denied over his proper and timely objection and for which he properly reserved his bill of exceptions. The Petitioner Does Respectfully Request That His Honorable Court Give This Matter Its Consideration and Rule on This Vital Question Presented.

Conclusion

In the Government's effort to set forth their contention that a single scheme and conspiracy was engaged in by all of the defendants in this Mass Trial—where the individual was lost in his own entity and being—the Government could not have done a better job for this petitioner than citing as an example the transactions of Miss Lorena Duling, for, in so doing, they have not only invited defeat of their contention from the evidence but are actually shown conclusively by such evidence there that the elements of agreement—knowledge—concert of action of the defendants there involved does not exist in a single conspiracy and scheme. In fact there may be shown several schemes there but not one as charged by the indictment and contended by the Government. Had there been one single scheme as the Government would have this Court believe—the evidence

would have revealed co-ordination and mutual assistance of action between the defendants there involved and not the separate efforts there shown by the evidence where there was the effort to arouse suspicion and to nullify the effect of the sales there made where such could not possibly come within the breadth and scope of a single scheme. Here was suspicion aroused by this petitioner and Overgaard by telling the investor-witness that her deeds were not correct —also that Safir advised her that he had seen Diaz and Silverman talking together when Diaz had emphatically stated to the witness that he did not know Silverman. Those acts are in fact acts to prevent sales rather than to make sales and cannot possibly come within the elements of agreement—knowledge and concert of action in a common enterprise. There is no better illustration of the fact on the non-existence of a single scheme than the careful study of the evidence here related and the petitioner here contends that the Government has done him a favor in opening the door for this matter to be shown in its true light.

The Government's contention in relation to the question of the issue of the "speedy trial" question has been adequately presented in this and the original brief.

It is respectfully submitted that the judgment be reversed.

RUBEIN V. JOHNSON.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S APPLICATION FOR REVIEW OF DENIAL OF CERTIORARI

To the Honorable Chief Justice and Associate Justices:

Preliminary Statement

Petitioner having properly filed Brief and Reply Brief in support of his Application for Certiorari on the above entitled case; and such having been heard and denied by this Honorable Court on October 28, 1946; Petitioner, then by Western Union Telegraphic Motion requested that, "A Stay of the Order of the Court Be Granted Him Pending

His Application For Review of Denial of Certiorari." Such stay was granted pursuant to Petitioner's requested action on October 30, 1946, and in accordance therewith, the Petitioner does herein set forth the following reasons for such review in the following terms, to wit:

Reasons for Request of Review of Denial of Certiorari

1

THAT THE TRIAL COURT SHOULD HAVE GRANTED THIS DEFENDANT'S MOTION FOR DIRECTED VERDICT WHICH MOTION WAS MADE AT THE OPENING OF THE TRIAL FOR THE REASON THAT THE DEFENDANT HAD BEEN DENIED A SPEEDY TRIAL GRANTED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner respectfully states that he believes that he has a true and just cause to complain of in the matter of the abridgment of his vested right to a Speedy Trial by the arbitrary act of Government such as was here the case. Petitioner has covered the factual and legal elements involved in his Brief and Reply Brief to the best of his ability as a layman not very well versed in law. He justly believes that the combination of those factual and legal elements which go to constitute his cause in this matter places him well within the sphere and scope of an invasion of that valuable guarantee of the Sixth Amendment.

Petitioner further believes that the Founding Fathers of this great nation, in their foresight, placed such guarantee of human right within the Sixth Amendment to prevent the arbitrary act of Government in relation to this matter; whereas, without such, that sacred guarantee would be lost in some instances, where officials acting under the color of authority could hide behind the cloak of their office with immunity to desecrate and ignore fundamental human rights in the proper and speedy adjudication of pending

indictments. Petitioner urges that the question at hand is vital and important NOT ONLY IN THE FACT THAT THIS CASE REPRESENTS AN INVASION OF THAT GUARANTEE, BUT FURTHER, THE DANGER OF PRECEDENT BEING MADE IN DENIAL OF CERTIORARI . . . FOR SUCH DOES THE DOOR FOR FURTHER ABUSE . . . IN THAT . . . (for illustration and an example) . . . WHY DELAY TRIAL FOR ONLY EIGHTEEN MONTHS IN THIS CASE? THE GREEN LIGHT HAS NOW BEEN GIVEN TO DELAY TRIAL AS LONG AS THE GOVERNMENT SEES FIT TO DO SO IN ANY CASE. IT MIGHT BE SIXTY MONTHS OR YEARS AT THE CONVENIENCE OF GOVERNMENT IN FLAGRANT DISREGARD OF THIS GUARANTEE OF THE SIXTH AMENDMENT. THUS, ONE MAY, IN EFFECT, BE IMPRISONED "without trial" INDEFINITELY BY AN ARBITRARY ACT OF GOVERNMENT THROUGH OFFICIALS ACTING UNDER THE COLOR OF THEIR AUTHORITY WHO WILL HAVE ONLY TO OFFER ONE EXCUSE AFTER ANOTHER TO SUIT THEIR OWN CONVENIENCE. NOT ONLY MAY ONE BE INDEFINITELY IMPRISONED WITHOUT TRIAL DUE TO HIS BEING UNABLE TO BE AT LIBERTY UNDER BOND BUT FURTHER IF HE IS AT LIBERTY UNDER BOND HE WILL HAVE TO BE SUBJECTED TO MENTAL STRAIN AND ANXIETY TO CAUSE HIM CRUEL AND UNUSUAL PUNISHMENT CONTRARY TO THE EIGHTH AMENDMENT; AND FURTHER, DENY TO HIM HIS RIGHT OF "DUE PROCESS OF LAW" IN RELATION TO THE RULES OF PROCEDURE PRESCRIBED BY THIS HONORABLE COURT. The resultant evils are many and almost unlimited in their breadth and scope.

This Court and secondary Courts have laid down certain principles of law in relation to this question BUT UNDER THE IDENTICAL FACTUAL AND LEGAL ELEMENTS HERE INVOLVED; THIS COURT HAS NEVER RULED ON THIS VITAL QUESTION WHERE ONE HAS COMPLIED WITH THE NECESSARY LEGAL REQUISITES TO COME SQUARELY WITHIN THOSE PRINCIPLES OF LAW. This petitioner has complied in every way with those requirements, inasmuch, as he has TWICE DEMANDED TRIAL, ONCE BY LETTER, ONCE BY MOTION, AND WAS TWICE IGNORED BY THE GOVERNMENT.

PETITIONER WHEN FINALLY BROUGHT TO TRIAL AFTER UNWARRANTED AND UNREASONABLE DELAY FILED A WRITTEN MOTION FOR DIRECTED VERDICT SUCH BEING DENIED, WITH PROPER EXCEPTIONS TAKEN BY YOUR PETITIONER. At no time . . . nor at any point has your petitioner acquiesced in this matter BUT THE CIRCUIT COURT OF APPEALS RENDERED AN OPINION IN RELATION TO THIS QUESTION DIRECTLY IN CONFLICT WITH ALL AUTHORITY AS PRESCRIBED BY PRINCIPLES OF LAW LAID DOWN BY THIS COURT AND SECONDARY COURTS IN RELATION THERETO, AND FURTHER, IN CONFLICT WITH THEIR OWN OPINION AS TO THOSE SAME PRINCIPLES OF LAW CITED IN A PRIOR CASE WHICH IS LISTED UNDER THIS PETITIONER'S BRIEF, WHERE IN SUCH CASE, WAS A RE-ITERATION OF OPINION IN CONFLICT WITH THEIR OPINION IN THIS CASE.

Petitioner believes that a grant of certiorari in this case will bring to light the true damage of the attendant evil of the invasion of his vested right in this matter, and further, will enable this Honorable Court to place a limitation on such unwarranted delays for all future time with clarity of thought and justice for all in relation to the factual and legal elements that go to constitute the cause of this Petitioner in this matter.

2

ADOPTION BY REFERENCE OF OTHER REASONS WHICH MAY BE RAISED BY COUNSEL OF PETITIONER'S CO-DEFENDANTS IN THEIR APPLICATION FOR REVIEW OF DENIAL OF CERTIORARI.

Petitioner does here adopt by reference, as fully so as if repeated word for word, any and all reasons and argument which shall be advanced by Petitioner's Co-Defendants—through their counsel—in their applications for Review of Denial of Certiorari, where such be applicable to the cause of this Petitioner.

Conclusion

The Petitioner respectfully submits that in his request for a Stay of the Issuance of the Order of the Court in Denial of Certiorari in his case—that such action was not therein requested for delay but in his sincerity of belief that this Honorable Court should review this matter because of the importance of the issues concerned, and that, Certiorari should be granted for the reasons herein stipulated.

Wherefore, Your Petitioner Prays:

This Honorable Court, under the authority vested therein, will review Order in Denying Certiorari and WILL ORDER that Petitioner's action in requesting a Grant of Certiorari be sustained.

Respectfully submitted,

RUBEIN V. JOHNSON,
Petitioner.

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